BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SAUL IZAGUIRRE	)	
Claimant	)	
	)	
VS.	)	Docket No. 265,056
	)	
IBP, INC.	)	
Self-Insured Respondent	)	

ORDER

Respondent requested review of the April 10, 2003 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on October 8, 2003.

APPEARANCES

George H. Pearson of Topeka, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board the parties agreed that August 3, 2002 was the date of accident for calculation of the award and further agreed that claimant's functional impairment as a result of his work-related accident is 12 percent.

ISSUES

The Administrative Law Judge (ALJ) determined claimant made a good faith effort to find appropriate employment and therefore awarded claimant an 85 percent work disability based on a 100 percent wage loss and a 70 percent task loss.

The respondent requested review and argues that claimant failed to make a good faith effort to find appropriate employment and a $6.50 post-injury wage should be imputed to claimant. This would result in a 43 percent wage loss for the calculation of the work

disability. And respondent further argues the job task list prepared by claimant's vocational expert is flawed and, therefore, Dr. Jeffrey T. MacMillan's task loss opinion, using the task list prepared by respondent's vocational expert, should be adopted. This would result in a 45 percent task loss. Consequently, respondent argues that claimant's work disability percentage should be reduced to 44 percent based on a 43 percent wage loss and a 45 percent task loss.

Conversely, claimant argues that he made a good faith effort to find employment after respondent would no longer provide accommodated work and the ALJ's Award should be affirmed.

The sole issue for Board determination is the nature and extent of claimant's work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that the ALJ's Award should be affirmed.

The claimant completed the ninth grade of education while in Mexico. Claimant does not speak English. On April 29, 1996, claimant began employment with respondent. This was claimant's first job. It was undisputed that claimant suffered repetitive trauma injuries to his bilateral upper extremities. Claimant continued working for respondent until August 3, 2002. At that point respondent concluded that it could no longer provide accommodated work within Dr. MacMillan's permanent restrictions.

Dr. MacMillan had initially treated claimant for a back injury and after that problem resolved claimant returned to the doctor on February 8, 2002, with complaints of bilateral upper extremity pain. The doctor diagnosed bilateral ulnar neuropathy at both the elbow and wrist. After a short course of conservative treatment, surgery was discussed but the claimant preferred to continue with conservative treatment consisting of anti-inflammatory medication.

Dr. MacMillan requested a functional capacities evaluation be performed to assist in the determination of appropriate physical restrictions. The report indicated the testing was invalid because claimant's level of effort was inconsistent. The doctor determined claimant had reached maximum medical improvement on June 14, 2002, and pursuant to the AMA *Guides*,[1] opined claimant suffered a 10 percent permanent partial functional impairment to each upper extremity. The doctor converted the ratings to an 11 percent whole person impairment. The doctor further noted claimant should avoid lifting or carrying

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

greater than 20 pounds and frequent lifting or carrying should not exceed 10 pounds. Although the FCE results were invalid the doctor utilized those results for purposes of defining work restrictions.

Dr. MacMillan later testified that ulnar neuropathy would not require lifting restrictions because lifting or carrying would not provoke ulnar nerve symptoms. Instead the doctor noted that repetitive elbow flexion and extension would provoke such symptoms. Consequently, the doctor noted the appropriate work restrictions would be avoidance of repetitive elbow flexion and extension.

Claimant was examined by Dr. Sergio Delgado at his attorney's request on May 15, 2001 and then again on September 17, 2002, for an impairment rating. The doctor diagnosed compression neuropathy of the ulnar nerves at the wrist and elbow. The doctor imposed restrictions against repetitive gripping, pinching, pushing or pulling with the bilateral upper extremities. Based upon the AMA *Guides*, the doctor opined claimant suffered a 10 percent permanent partial functional impairment to each upper extremity for mild ulnar entrapment neuropathy. The doctor noted each upper extremity rating would convert to a 6 percent whole person impairment which would combine for a 12 percent permanent partial functional impairment to the whole body.

Dan R. Zumalt, respondent's vocational expert, met with claimant and prepared a list of tasks claimant had performed in the 15 years preceding his work-related injury. Mr. Zumalt opined claimant retained the capacity to earn between $6 and $7 an hour. Mr. Zumalt agreed claimant's inability to speak English would cause difficulty in his re-employment efforts. Dick Santner, claimant's vocational expert, met with claimant on two occasions and prepared a list of tasks claimant had performed in the 15 years preceding his work-related injury. Mr. Santner agreed that claimant's inability to speak English would be an impediment to finding a job.

At the regular hearing the claimant was unemployed. After claimant was terminated from respondent, he returned to respondent every week and signed an employee bid sheet in order to obtain work. But he noted that there was never a job up for bid that was within his restrictions. Claimant also provided a list of businesses he had contacted either personally or by telephone seeking employment. Although claimant did not check the newspaper for jobs he did note that he had someone check for him. Claimant had not gone to job service but he testified that he did not know what that was.

The Board finds claimant has a 12 percent permanent partial functional impairment to the whole body as a result of his work-related injury. Both doctors concluded claimant had suffered a 10 percent permanent partial impairment of function to each upper extremity. Dr. Delgado correctly converted and combined those ratings to a 12 percent whole person impairment.

When an injury does not fit within the schedules of K.S.A. 1999 Supp. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[4]

---

[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] Id. at 320.

The ALJ concluded that claimant made a good faith effort to find employment after he was terminated by respondent. As previously noted, claimant speaks no English and both vocational experts agreed that would hinder claimant's ability to find employment. Claimant returned to respondent on a weekly basis to bid on jobs. In addition, he had other individuals check for him for jobs listed in the newspapers and he sought employment, either in person or by telephone, at 35 different business locations. Although claimant agreed that he had not contacted job service, it was clear that he was unaware that job service existed or was available to assist in locating employment.

And even though respondent had terminated claimant, it never discouraged him from making a weekly check to see if there were jobs available with respondent to bid on for re-employment. It certainly could be confusing to claimant, with his limited education and inability to speak English, to be allowed to fill out an employee bid sheet even though he was no longer an employee.[5] This could certainly create a false sense that re-employment with respondent was a realistic option despite the fact respondent had terminated claimant because it could not accommodate his restrictions.

The Board affirms the ALJ's determination the claimant made a good faith effort to find appropriate employment after he was terminated from his job with respondent. Accordingly, because he remained unemployed at the time of the regular hearing, he has suffered a 100 percent wage loss.

During his deposition, Dr. MacMillan testified that he reviewed a list of claimant's former work tasks prepared by vocational consultant Dan R. Zumalt and the doctor indicated claimant should not perform approximately 45 percent of the nonduplicative tasks. Dr. MacMillan also reviewed a list of claimant's former work tasks prepared by vocational rehabilitation counselor Richard Santner and the doctor indicated claimant should not perform approximately 40 percent of those tasks. During his deposition, Dr. Delgado reviewed the task list prepared by Mr. Santner and concluded claimant should not perform any of the tasks. Consequently, the claimant's task loss is somewhere between the 40 percent rating provided by Dr. MacMillan and the 100 percent rating provided by Dr. Delgado. The ALJ averaged the high and low ratings for a 70 percent task loss. The Board agrees with that determination and affirms.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Brad E. Avery dated April 10, 2003, is affirmed.

IT IS SO ORDERED.

---

[5] R.H. Trans., Cl. Ex. 3.

Dated this 31st day of October 2003.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director